IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: WAMBALI, J.A., LEVIRA, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 275 OF 2020

ATHANAS MBILINYI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Iringa)

(Matogolo,J.)

dated the 31st day of March, 2020

in

DC Criminal Appeal No. 60 of 2019

JUDGMENT OF THE COURT

28th October, & 1st November, 2022

LEVIRA, J.A.:

The appellant, Athanas Mbilinyi unsuccessfully appealed to the High Court of Tanzania at Iringa (the first appellate court) against the decision of the Kilolo District Court at Kilolo (the trial court) in Criminal Case No. 7 of 2019. In the said decision, the trial court convicted the appellant of the offence of rape of a girl aged eight (8) years old contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E. 2002 now R.E. 2022] (the Penal Code). Upon conviction, the appellant was sentenced to life imprisonment.

During trial, the prosecution called a total of four (4) witnesses and tendered one (1) exhibit to prove the case against the appellant. On the defence side, the appellant was the sole witness. On account of what is about to come into light shortly, we shall neither reproduce the summary of evidence adduced before the trial court nor all the appellant's grounds of appeal presented before us. Suffices here to state that, both lower courts made a concurrent finding that the appellant committed the offence with which he was charged despite his defence in which to a larger extent he denied to have committed the charged offence. We also wish to state that on 8th December, 2020 the appellant filed a memorandum of appeal comprising of six (6) grounds of appeal. However, it was only the first ground of appeal which was argued during hearing of this appeal following consensus by the parties and leave of the Court that it suffices to dispose off the appeal. The said ground of appeal is hereunder paraphrased as follows:

> *"1. That, the High Court wrongly upheld the decision of the trial court without considering that the appellant's age was not resolved in accordance with the law."*

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas, the respondent Republic was represented by Ms.

Hope Charles Massambu, learned State Attorney. The appellant adopted his ground of appeal as part of his submission and preferred to hear first from the learned State Attorney and reserved his right to rejoinder.

At the outset, Ms. Massambu supported the appeal on the first ground as to omission of the trial court to resolve the issue of the age of the appellant. She conceded that according to the record of appeal, the appellant told the trial court that his age was 16 years, instead of 26 years which was recorded in the charge sheet when the charge was about to be read over to him. However, for an unapparent reason, the learned trial magistrate did not conduct an inquiry in terms of sections 113 and 114 (1) and (2) of the Law of the Child Act [Cap 13 R.E. 2019] (the LCA) to ascertain the age of the appellant. She went on to state that it was wrong for the learned trial magistrate to proceed with the trial, having observed earlier that there was no proof that the appellant was under age and later during defence, to have recorded him having 19 years. According to Ms. Massambu, the purported appellant's age of 19 years recorded by the learned trial magistrate, fixed the first appellate judge in a trap which influenced his erroneous decision that the appellant was 19 years old when he was addressing the first ground of appeal presented before him as reflected in the record of appeal.

Ms. Massambu argued that, since the age of the appellant was not proved though in issue, he was affected because the question whether he was under or above 18 years old had a bearing on the mode of the trial and the type of sentence he should have suffered. Therefore, she urged us to nullify the proceedings of the trial and first appellate courts and order for a retrial of the appellant considering the fact that there is sufficient evidence to support the prosecution case.

Following the submission in support of the appeal by Ms. Massambu, the appellant had a very brief rejoinder clarifying that he did not produce evidence before the trial court to prove that he was 16 years old and did not know the source of the age of 19 years recorded by the trial magistrate and confirmed by the first appellate judge. He insisted that his age was 16 years at the time he was arraigned before the trial court. Finally, he prayed to be set free.

We have carefully considered submissions by the parties, the ground of appeal under consideration and the entire record of appeal. The sole issue arising from this ground is whether the controversy regarding the age of the appellant was resolved in accordance with the law. The answer to this issue is not farfetched. The law is settled on the procedure to be adopted in the circumstance where the age of an accused person is

at issue; particularly, when it is alleged that the accused person is under the age of majority. We take liberty to reproduce at length what is provided under sections 113 and 114 of the LCA hereunder:

> *"113.- (1) Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is a child, the court shall make due inquiry as to the age of that person.*
>
> *(2) The court shall take such evidence at the hearing of the case which may include medical evidence and, or DNA test as is necessary to provide proof of birth, whether it is of a documentary nature or otherwise as it appears to the court to be worthy of belief.*
>
> *(3) A certificate purporting to be signed by a medical practitioner registered or licensed under the provisions of the law governing medical practice in Tanzania as to the age of a child shall be sufficient evidence and shall be receivable by a court without proof of signature unless the court orders otherwise.*

(4) An order or judgement of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court and the age so brought before it shall, for the purposes of this section, be deemed to be the true age of that person.

(5) Medical evidence and or collection of blood for the purpose of DNA from the child shall be conducted in the presence of a social welfare officer.

114.-(1) Where it appears to the court that any person brought before it is of the age of beyond eighteen years, that person shall, for the purposes of this section, be deemed not to be a child.

(2) Without prejudice to the preceding provisions of this section, ***where the court has failed to establish the correct age of the person brought before it, then the age stated by that person,*** *parent, guardian, relative or social welfare officer shall be deemed to be the correct age of that person."* [Emphasis added].

In the current case, when the charge was about to be read over to the appellant and upon his age being mentioned to be 26 years, the appellant brought to the attention of the trial magistrate that he was of the age of 16 years and not of the mentioned age. For ease of reference, we shall reproduce part of the record so as to appreciate what had transpired:

> *"**PP**: It's a fresh charge, I pray to read over the charge to the accused.*
>
> ***Accused**: Your honour, although I was recorded 26 yrs, but I am sixteen years, I completed STD VII last year.*
>
> ***Court**: Upon inquiry further information, from the Accused himself, he gives different versions of his age. Meanwhile, there is no proof of age that the accused is under age. Let the charge be read over him in Swahili Language and he makes his plea.*
>
> ***Accused plea**: It is not true.*
>
> ***Court**: EPNG.*
>
> ***Sgd**: S. A. Mshasha – SRM."*

Thereafter, the trial proceeded and during defence while recording particulars of the appellant, the trial magistrate recorded his age to be 19

years as reflected in the record of appeal. As intimated above, at the end of the trial, the appellant was sentenced to life imprisonment. He was not satisfied and thus appealed to the first appellate court where his first ground was a complaint on the unresolved issue of his age. In determining the said ground, the first appellate judge had this to say:

> *".... It means that on the date he was convicted he was above 19 years and as only six months passed from the date he first appeared in court on 29/01/2019 even on 23/01/2019 the date the offence was alleged to have been committed he was over 18 years thus an adult. The appellant did not furnish further evidence to prove that he was under age at the time of commission of the offence thus the issue of appellant's age was settled such that this ground lack merit."*

The above excerpt depicts that the first appellate judge was aware that evidence was needed as per the requirements of the above quoted law to establish the contested age of the appellant but was swayed away by what was recorded by the trial magistrate during defence case. He unfortunately threw a blame to the appellant for not furnishing evidence to prove his age without considering the fact that the trial magistrate ought to have conducted an inquiry to establish the same through any of

the following; medical evidence, DNA test, Birth Certificate and if failed to do so, the law required her to consider the age stated by the appellant, his parent, guardian, relative or social welfare officer as the correct age of the appellant.

For the purpose of this case, since the record is silent as to whether those people mentioned above were present when the trial was about to start or at any stage of it, the trial magistrate ought to have conducted an inquiry into the age of the appellant in either of the ways stated above and in the event of failure, she should have placed reliance on the 16 years age claimed by the appellant. Failure to do so, in our considered view, occasioned miscarriage of justice on the part of the appellant as it left a lot to be desired. This is so because if it had been proved that the appellant was under age, he would have been arraigned before the Juvenile Court in terms of section 98 (1) (a) of the LCA and not the District Court in which he was arraigned and if found guilty, he would have been sentenced accordingly – see: **Furaha Johnson v. Republic**, Criminal Appeal No. 452 of 2015 and **Amos Robare @ James v. Republic**, Criminal Appeal No. 401 of 2017 (both unreported). In **Furaha Johnson's case** (supra) the District Court of Moshi tried the appellant who was 17 years old in connection with the offence of rape. On appeal

to the Court, it was held that, since the appellant at the time of his arraignment and trial was a child, he was not triable by the district court, but Juvenile Court. The trial court, therefore, lacked *jurisdiction ratione personae* to try the appellant and hence, the trial was declared a nullity.

We wish also to point out that, the life imprisonment sentence meted out to the appellant is tantamount to causing more injustice to him under the circumstances of this case where his age is not established. We therefore, agree with Ms. Massambu that the proper cause to take in this case is to nullify the lower courts' proceedings and order for a retrial of the appellant. In a retrial, the trial court must abide by the procedure of establishing the appellant's age at the time of commission of the offence as stipulated under Rule 12 of the Law of the Child (Juvenile Court Procedure) Rules, 2016, which provides as follows:

> *"12 – (1) Where a person appearing before the court claims to be a child, and that claim is in dispute, the court shall cause an inquiry to be made into the child's age under section 113 of the Act.*
>
> *(2) The court may, in making inquiries, under sub-rule (1), rely upon:*
>
> *(a) the child's birth certificate;*

(b) such medical evidence as is necessary to provide proof of birth whether it is of a documentary nature or otherwise;

(c) information from any primary school attended by the child as to the child's date of birth;

(d) any primary school leaving certificate or its equivalent certificates; and

(e) any other relevant credible information or document.

(3) A birth certificate shall, unless rebutted, be presumed to provide conclusive proof of the age of the child.

(4) Where documents referred to under sub-rule (2) are not available or do not determine the age of the child, the court may take into account the following evidence:

(a) any immunisation or medical records;

(b) a medical examination of the child to determine age, save that skeletal X-ray's shall not be used as a means of determining age without the leave of the court and such leave shall only be given in exceptional circumstances;

(c) a social enquiry report requested by the juvenile court to assist in determining the child's age.

(5) N / A.

(6) N / A.

(7) Where the enquiry is inconclusive on the matter of age, but there is cause to believe that the person may be a child, it shall be presumed that the person is a child under the age of 18 and shall be treated as such.

(8) Where the court finds in criminal or civil proceedings that a person whose age is in dispute is a child and proceeds on that basis, a decision, order or judgment of the court shall not be invalidated or re-opened as a result of any subsequent finding or proof that the age of the person was not correctly stated to the court."

In the strength of what we have endeavoured to discuss above, we allow the appeal in respect of the first ground, nullify the proceedings of the trial and first appellate courts, quash the conviction and set aside the life imprisonment sentence meted out on the appellant. We order for a retrial of the appellant with immediate effect before another magistrate and subject to an inquiry being made as of the age of the appellant as we

discussed above. In the meantime, the appellant shall remain in custody pending retrial in accordance with the law upon establishment of his age at the time of commission of the offence.

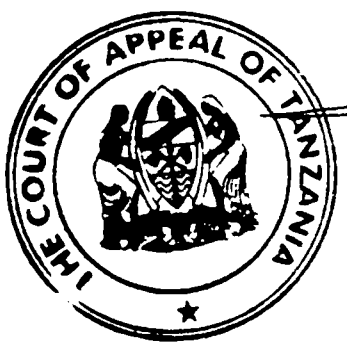
DATED at **IRINGA** this 31st day of October, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered this 1st day of November, 2022 in the presence of the Appellant in person and Mr. Tito Mwakalinga, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL